A

SYED ABDUL RAHMAN WAN AKIL

v.

PP

B

HIGH COURT SABAH & SARAWAK, KUCHING
HAMID SULTAN ABU BACKER JC
[CRIMINAL APPEAL NO: 42-03-2006-II]
29 OCTOBER 2007

C ***CRIMINAL PROCEDURE:*** *Charge - Criminal breach of trust - Allegation of - Whether prosecution failed to prove accused a government servant - Letter tendered by prosecution to show appellant in employment of government - Whether ought not have been admitted - Whether there was clear substantiation to show property/money entrusted to appellant -* D *Penal Code, s. 409*

CRIMINAL PROCEDURE: *Charge - Amendment - Whether repeated same offence - Criminal Procedure Code, s. 173(h)(ii) - Whether amendment must be other than offence charged - Criminal Procedure Code, s. 422*

E

The appellant herein appealed against conviction and sentence in respect of an offence punishable under s. 409 of the Penal Code. The appellant was earlier charged for committing criminal breach of trust in his capacity as a government servant/treasury clerk in F respect of certain property, to wit, cash amounting to RM253,848.09. At the end of the prosecution's case, the Sessions Court Judge had acquitted the appellant for the above charge and thereafter amended the charge in respect of the quantum of money only to RM207,210.29. The petition of appeal G of the appellant *inter alia* could be summarized as follows: (1) the learned trial Sessions Court Judge had erred in law and fact for making a ruling that the first ingredient *ie*, the appellant as a government servant and under such capacity had been made out by the prosecution when such strict evidence in respect thereof H was lacking and wanting which had caused a failure of justice; (2) the learned trial Sessions Court Judge had misdirected herself in making a ruling when the prosecution had failed to prove a *prima facie* case on the first original charge but amended the charge pursuant to s. 173(h)(ii) of the Criminal Procedure Code ('CPC') I and (3) the learned trial Sessions Court Judge had in erred in law and fact for making a finding of guilt of the appellant which was

not only contrary to the weight of evidence but also the possibilities which could not be supported on detailed examination of the evidence.

Held (allowing the appeal):

(1) The prosecution had failed to prove strictly that the accused was a government servant who was in the capacity entrusted with the money. The letter tendered by the prosecution witness to show that the appellant was in the employment of the government, exh. P5, was a photocopy and *prima facie* it ought not have been admitted; more so when the issue whether or not the accused was a government servant was an ingredient of the offence. (para 8)

(2) The charge in this case was amended in respect of the quantum of money only and under s. 173(h)(ii) of the CPC the amendment must be other than the offence charged. In this case, the amendment repeated the same offence. It was illegal and could not be cured under s. 422 of the CPC. (para 3)

(3) From the salient points of the evidence as highlighted by the prosecution, this court could not intelligibly ascertain all the elements of the charge the prosecution had to prove, to sustain a conviction as charged. According to *Ratanlal's Law of Crimes*, the word 'entrusted' when used with respect to money means that the money has been transferred to the accused under circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecution and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instruction. There was no clear substantiation to show that the money as stated in the charge was entrusted to the appellant. (paras 7 & 8)

Case(s) referred to:

Mohd Abdullah Ang Swee Kang v. PP [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 SC ***(refd)***

PP v. James Tan [1983] 1 LNS 24 HC ***(refd)***

PP v. Sa'udi Malaini (Kuching Sessions Court No: SC (SG) 61-10-2004-1) (Unreported) ***(refd)***

PP v. Tan Kim Kang & Ors [1962] 1 LNS 137 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 173(f), (h), (i), (ii), 422
Penal Code, ss. 405, 409

Other source(s) referred to:
Ratanlal & Dhirajlal's Law of Crimes, 24th edn, p 1963
Ratanlal's Law of Crimes, 24th edn, p 1964

For the appellant - Osman Ibrahim; M/s Osman Ibrahim & Co
For the respondent - Mohd Mukhzany Fariz Mohd Mokhtar DPP

Reported by Suhainah Wahiduddin

JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the appellant's appeal against conviction and sentence in respect of an offence punishable under s. 409 of the Penal Code.

[2] The appellant was charged as follows:

> That you, between the 20th day of December, 1997 and 12th day of June, 2001 at Pejabat Perbendaharaan Kecil Sebuyau, in the District of Simunjan, in the State of Sarawak, being a government servant, to wit, a treasury Clerk, in such capacity entrusted with certain property, to wit, cash amounting to Ringgit Malaysia Two Hundred Fifty Three Thousand Eight Hundred Forty Eight and Nine Cent (RM 253, 848.09), committed Criminal Breach of Trust in respect of the said property, and that you thereby committed an offence punishable under Section 409 of the Penal Code.

[3] At the end of the prosecution case, the learned sessions judge acquitted the appellant for the above charge and thereafter amended the charge. The amended charge reads as follows:

> That you on or about 7th day of June, 2001 at Pejabat Perbendaharaan Kecil Sebuyau, in the District of Simunjan, in the State of Sarawak, being a government servant, to wit, a treasury clerk, in such capacity, entrusted with certain property, to wit, cash amounting to RM207, 210.29, committed criminal breach of trust in respect of the said property, and that you thereby committed an offence punishable under Section 409 of the Penal Code.

The relevant part of the notes of proceedings which resulted in the amendment for which the appellant has taken objection reads as follows:

> At the conclusion of the case for the prosecution, it is my finding that a *prima facie* case has not been made out against the accused. Pursuant to section 173(f)(ii) of the Criminal Procedure Code, I acquit the accused of the charge preferred against him. However, the evidence adduced by the prosecution shows that a *prima facie* case has been made out against the accused on an offence other than the offence charged. Pursuant to section 173 (h) (ii) I amend the charge against and the amended charge reads as follows:
>
> > That you on or about 7th day of June, 2001 at Pejabat Perbendaharaan Kecil Sebuyau, in the District of Simunjan, in the State of Sarawak, being a government servant, to wit, a treasury clerk, in such capacity, entrusted with certain property, to wit, cash amounting to RM207, 210.29, committed criminal breach of trust in respect of the said property, and that you thereby committed an offence punishable under Section 409 of the Penal Code.
>
> Amended charge read to the accused in Bahasa Malaysia. Accused understood the amended charge and pleaded not guilty.
>
> ...
>
> Mr. Osman:
>
> > The moment Your Honour had pronounced the acquittal and discharge of the accused pursuant to s. 173(f)(ii) Criminal Procedure Code, I submit that should be the end of the matter. It is against s. 302 and 303 of the Criminal Procedure Code when Your Honour preferred another charge when he had been acquitted on the charge.
>
> P.O:
>
> > I concur the learned counsel's application.

I take the view that there were merits in the appellant's counsel objection. My reasons are as follows:

(i) Under s. 173 of the Criminal Procedure Code (CPC) there is no provision in law to acquit the accused at the end of the prosecution's case and thereafter amend the charge and take a fresh plea.

(ii) The relevant sub-section on the facts of this case is s. 173(f) and (h) to be read with s. 173(f)(i) and (ii) of the CPC which states as follows:

> 173. The following procedure shall be observed by Magistrates in summary trials:
>
> (a) …
>
> (b) …
>
> (c) …
>
> (d) …
>
> (e) …
>
> (f) (i) When the case for the prosecution is concluded the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.
>
> (ii) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the court shall record an order of acquittal.

Section 173h(i) and (ii) reads as follows:

> (h) (i) If the Court finds that a *prima facie* case has been made out against the accused on the offence charged, the Court shall call upon the accused to enter on his defence.
>
> (ii) If the Court finds that a *prima facie* case has been made out against the accused on an offence other than the offence charged which the Court is competent to try and which in the opinion of the Court it ought to try, the Court shall amend the charge.

Thus, it is clear from the above provision that you cannot acquit and thereafter amend the charge. Such an act will in my view amount to an illegality and cannot be cured under s. 422 of the CPC. Further, the charge in this case was amended in respect of the quantum of money only and under s. 173(h)(ii) the amendment must be other than the offence charged (emphasis is mine). In this case, the amendment repeats the same offence. On this fact, I take the view it is illegal and cannot be cured under s. 422 of the CPC. On this reason alone, notwithstanding the appellant has not raised it in the petition, I ought to allow the

appeal in the interest of justice. However, before deciding whether or not to allow the appeal it will be prudent of me to consider the merits and thereafter decide.

[4] The petition of appeal of the appellant *inter alia* can be summarised as follows:

(a) (i) the learned trial sessions court judge had erred in law and fact for making a ruling that the first ingredient of the charge, ie, the appellant as a government servant to wit, a treasury clerk and under such capacity had been made out by the prosecution when such strict evidence in respect thereof is lacking and wanting which has caused a failure of justice.

(ii) the learned trial sessions court judge had erred in law and fact for making a ruling that the second ingredient of the charge, ie, in entrustment of RM207,210.29 has been amply proven when it is against the weight of the evidence adduced.

(iii) the learned trial sessions court judge had erred in law and fact for making a ruling that the third ingredient of the charge, ie, misappropriation has been made out by the prosecution when it is against the evidence adduced.

(iv) the learned trial sessions court judge had erred in law and fact for making a ruling that the prosecution has made out a *prima facie* case based on a maximum evaluation of evidence when the prosecution had failed to prove the ingredients of the offence charged or it is against the evidence adduced.

(v) the learned trial sessions court judge had erred in law in making a ruling that the prosecution has failed to prove a *prima facie* case on the first original charge and thereby pronounced the appellant to be acquitted and discharged but later amended the charge which had caused a failure or miscarriage of justice.

(vi) the learned trial sessions court judge had misdirected herself in making a ruling when the prosecution has failed to prove a *prima facie* case on the first original charge but amended the charge pursuant to s. 173(h)(ii) of CPC.

(vii) the learned trial sessions court judge had misdirected herself in making a ruling when the prosecution has failed to prove a *prima facie* case on the first original charge but amended the charge pursuant to section 173(h)(ii) of CPC without affording and warranting the appellant to recall any witness, if any which omission has caused a failure of justice.

(viii) the learned trial sessions court judge had erred in law and fact for making a finding of guilt of the appellant which was not only contrary to the weight of evidence but also the possibilities which could not be supported on detailed examination of the evidence. Alternatively, the learned trial sessions court judge had in law and fact for not adequately considering the defence.

(b) the appellant is also dissatisfied in respect of the sentence imposed by the learned sessions court judge and on the facts I find it unnecessary to deal with the same.

[5] The prosecution has summarised the material part of the evidence of the witness and the said statement reads as follows:

PW1 : Saupi Shibli

On 25-07-2002, I was the Head of Inquiry Room in Sebuyau Police Station. On that day, at 2.00 p.m I received a report from District Officer, Mr. Sulaiman Han, regarding a breach of trust case. Sulaiman Han wrote out the report himself (Report identified).

PW2 : Sulaiman Han

On 5-07-2002, I was serving as District Officer, Simunjan. On 29.01.2002, SAO in Sebuyau informed me that he suspected there was something amiss in Pejabat Daerah Kecil Sebuyau.

I directed the SAO to make further check and to give me a written report. At the same time I informed my superior, Resident of Samarahan Division. He appointed me as Chairman of the Investigation Committee. During the course of my investigation, we called on the suspect to appear but he never did. We also found that the money amounting to over RM200,000.00 was unaccounted for.

I made the police report on 25.07.2002 at Sebuyau Police Station. I personally wrote the report.

I obtained the number and the date of the vouchers from the record at Sebuyau Sub-District. I came to the conclusion in the report because the account did not tally, the money was missing, the cheques issued were bounced. A written report was made and submitted to the Resident.

PW3 : Irwan Bin Abdullah

I am the Head of Sebuyau Sub-District. I am under Simunjan District Officer.

In June 2001, a group of officers from Treasury Samarahan visited Sebuyau Sub-District. Among them I can only recall Mr. Andrew Tang and Pn. Biayati. The visit was for routine checking on Sebuyau Sub-Treasury. After the inspection, they told me that they had not yet received Voucher No.8060001 dated 7.06.2001 amounting to RM 253,700.00. This Voucher contained cheques to be remitted to Samarahan Treasury. This Voucher is normally prepared by Treasury clerk who at the material time was Pembantu Tadbir, Syed Abdul Rahman (Accused identified). This Voucher should have been sent to Samarahan Treasury, but according to them, they had not received yet.

During the inspection, the Treasury team told me that Samarahan Treasury had yet to receive Voucher No. 8060001 (hereafter the said voucher). The said voucher contained remittance of cheques which had been cashed by Sebuyau Sub-Treasury. The record kept in Sebuyau Sub-District shows that the said voucher had been sent to Samarahan Treasury.

I went to see the Accused in his house. I asked him where was the said voucher. He told me that he had already sent it to Samarahan Treasury.

A month later, I received query from Samarahan Treasury stating that they still have not received the said voucher.

I then wrote a letter to the Accused who was then serving at Lands and Survey, Sibu pertaining to this said voucher and the cheques. The Accused send a written reply stating that the said voucher and cheques had been wrongly sent to Ministry of Education in KL (Where Accused's statement contradict himself). I asked the Accused which unit of Education Ministry did he send the said voucher and the cheques but he did not reply.

I furthered inquired from the Education Ministry in KL whether they had received the said voucher and the cheques. The Ministry then returned the said voucher together with 39 cheques. Subsequent to the receipt of the said voucher and 39 cheques, I

A further asked the Accused where were the remaining 50 cheques. He wrote back stating that the said voucher and the 39 cheques were what he had sent to the Education Ministry in KL. He did not know the whereabouts of the remaining 50 cheques.

B During the search, I was shocked to discover that the cheques number of some of the cheques were the number of previous cheques which had already been remitted Samarahan Treasury. Out of the 50 cheques, 43 had the number of the previous cheques. The use of previous cheque number means there is double entry. The 43 cheques were listed in the cheques C list annexed to the said voucher. The total amount of the 50 cheques which could not be found is RM 207,210.29.

From the finding that previous cheque number had been used, I sensed something was not right. I therefore informed the District Officer, Sulaiman Han.

D

PW4 : Bujang Bin Budin

I confirm that Syed Abdul Rahman Bin Wan Akil was in the permanent employment of the Government. (Exhibit P5)

E PW5 : Tambi Ak Ringi @ Tambie Ak Ringgi

On that day (12.06.2001), I took over duties from clerk Syed Abdul Rahman Bin Wan Akil. There was a handing over duty note in respect of the handing over (ID6) (later converted to Exhibit P6). SYED ABDUL RAHMAN BIN WAN AKIL F prepared it.

The original of the said voucher was handed over to me with only the list of cheque attached. That was all. I had to keep the said voucher until at the end of the month. I did not investigate the said voucher since the cheques had already been G submitted.

The Treasury team told me that they had yet to receive the cheques remitted under payment voucher No.8060001. They asked when did we post the cheques to the Treasury. I replied that I did not know because that was before the *(sic)* handed over H to me. I only had the original copy of the said voucher and the annexed list of cheques.

The said voucher was recorded in Buku T.14 (ID 7[a]) (later converted to Exhibit P7[a]) as remittance of cheques. It was I recorded by Syed Abdul Rahman Bin Wan Akil (Accused identified). ...

I recognize the Accused's handwriting. The Accused and I were working together in Sebuyau Sub-District from 3.12.1999 until the Accused's transfer to Lands and Surveys.

...

I know the handwriting in ID7(a) is that of the Accused because he was the only person in-charge of Sebuyau Sub-District before the handing over. While we were working together, I had the chance of seeing his handwriting.

PW6 : Nicholas Pang Ak Insa

I was present when Sulaiman Han conducted the inquiry. It was an inquiry into an alleged case of double posting of payment voucher on encashment of cheques. It was in respect of one payment voucher. ...

During the investigation what was shown to us was a copy of the said voucher. I call it double posting of payment voucher because the supporting documents had already appeared in one of the previous vouchers. They were of the same amount and encashment of the same cheques.

PW7 : Andrew Tan Thien Soon @ Azrani Tan Abdullah

After we have received the accounts from Sebuyau Sub-District, and after closing of account, we found that some of the accounts were questionable. Our office found something questionable and we made the surprise check.

The cash holding for Sebuyau Sub-district was RM 80,000.00 at any time. When they submitted the account, we found out that they had an access of over RM100,000.00. We expected the money and cheques to be inside the safe of Sebuyau Sub-District office. When we asked the office-in-charge (hereafter OIC) to open the safe, we found out that the total amount did not agree to the amount certified in Buku T.43 for the month ending 30.05.2001. The OIC told us that the cheques amounting RM253,700.00 was not in his possession and it was not in the safe. Upon our query, he told us that the cheques had been sent to our office by ordinary mail. That is non-compliance with the Treasury Instruction (hereafter TI) which provides that all cheques sent out must be by registered mail. The name of the OIC is Syed Abdul Rahman Bin Wan Akil (Accused identified).

PW8 : Haslinda Bt Abdul Ghani

The last sentence "Hasil semakan didapati bahawa sebilangan besar cek telah ditunaikan dua kali melalui cek yang sama tetapi berlainan baucar bayaran" in paragraph 2 of exhibit P8(1) means that the cheques number in the previous vouchers appeared again in voucher 8060001.

ID8(2)(3) show the cheques that had been encashed at Sebuyau Sub-Treasury. They show the cheque numbers that had been encashed in previous vouchers appeared again in the cheque annexed to the said voucher.

PW9 : Sharifah Rodziah Bt Sayeed

We compared the documents and found that the Cheque Registered for year 2000 was missing.

From our investigation, we concluded that the cheque number has been used twice.

Our finding is recorded on p. 3 of the report. Our conclusion is that a sum of RM207,210.29 from the State Government Account in Sebuyau Sub-Treasury had been withdrawn without proper authorization and is considered a loss. My signature is found on p. 4 of the report. Task Force Investigation Report: Exhibit P9.

PW10 : Chief Inspector Ang Tuan Pek

My investigation shows that the suspect is a former Pembantu Tadbir named Syed Abdul Rahman Bin Wan Akil (Accused identified).

[6] The learned DPP *inter alia* submits as follows: (i) this is not a case of mere failure to account for but also a case where the learned sessions judge had inferred from the surrounding circumstances that the appellant had misappropriated the sum entrusted to him. (ii) the learned sessions judge had adopted the correct standard of proof at the close of prosecution's case ie, she had applied the maximum evaluation test and she was correct to come to the finding that prosecution had made out a *prima facie* case against the accused. (iii) the proper time to amend a charge is at the close of the prosecution's case. This is expressly provided by s. 173(h) of the CPC which, indeed, not merely authorizes but positively requires the court to consider the charge at this stage and, if necessary, amend it. (see *PP v. Tan Kim Kang & Ors* [1962] 1 LNS 137 and *PP v. James Tan* [1983] 1 LNS 24 (iv)

that the sentences imposed are in line with the trend of sentencing policy in such cases. (see *Mohd. Abdullah Ang Swee Kang v. PP* [1987] 2 CLJ 405; [1987] CLJ (Rep) 209 and *PP v. Sa'udi bin Malaini,* Kuching Sessions Court No. SC (SG) 61-10-2004-1).

[7] I have read the appeal record, the submission of the appellant, respondent and the judgment of the learned sessions judge in detail. I take the view that the appeal must be allowed. My reasons are as follows:

(a) Section 409 must be read with s. 405 of the Penal Code. Section 405 states as follows:

> Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

(b) For the prosecution to succeed on the charge, the following ingredients must be proved beyond reasonable doubt. They are as follows: (i) entrusting any person with property or with any dominion over property. (ii) that person entrusted (a) dishonestly misappropriating or converting to his own use that property; or (b) dishonestly using or disposing of that property or wilfully suffering any other person so to do in violation – (i) of any direction of law prescribing the mode in which such trust is to be discharged; or (ii) of any legal contract made touching the discharge of such trust. (iii) the accused must be a public servant. (iv) he must have been entrusted, in such capacity, with property. (v) he must have committed breach of trust in respect of such property.

(c) I must say here looking at the salient points of the evidence as highlighted by the prosecution, that I could not intelligibly ascertain all the elements of the charge the prosecution has to prove, to sustain a conviction as charged. To establish a charge of criminal breach of trust, the prosecution is not obliged to prove the precise mode of conversion,

misappropriation or misapplication by the accused of the property entrusted to him or over which he has dominion. The principal ingredient of the offence being dishonest misappropriation or conversion which may not ordinarily be a matter of direct proof, entrustment of property and failure in breach of an obligation to account for the property entrusted, if proved, may, in the light of other circumstances, justifiably lead to an inference of dishonest misappropriation or conversion. Conviction of a person for the offence of criminal breach of trust may not, in all cases, be founded merely on his failure to account for the property entrusted to him, or over which he has dominion even when a duty to account is imposed upon him; but where he is unable to account or renders an explanation of his failure to account which is untrue, an inference of misappropriation with dishonest intent may readily be made. (see *Ratanlal & Dhirajlal's Law of Crimes* 24th edn at p. 1963).

[8] I am inclined to agree with the appellant's contention that the prosecution had failed to prove strictly that the accused was a government servant who was in the capacity entrusted with the money. The letter tendered by the prosecution witness to show that the appellant was in the employment of the government, exh. P5 was a photocopy and *prima facie* it ought not have been admitted; more so when the issue whether or not the accused was a government servant was an ingredient of the offence. In this case, it must be noted that the accused gave only an unsworn statement. That part of the evidence reads as follows:

DW1:

I do not know about this case. On my part I had never misuse the money amounting to RM207,000.00. That is all.

Mr. Osman:

That is all for the defence. May I ask for a date to prepare a written submission.

In this case, from the evidence from the prosecution, there is no clear substantiation to show that the money as stated in the charge was entrusted to the appellant. Entrustment according to *Ratanlal's Law of Crimes* (24th edn) at p. 1964 states that the word 'entrusted' when used with respect to money means that the money has been transferred to the accused under

circumstances which show that notwithstanding its delivery to the accused, the property in it continues to vest in the prosecutor and the money remains in the possession or control of the accused as a bailee and in trust for the prosecutor as bailor, to be restored to him or applied in accordance with the instruction.

[9] For reasons stated above, I take the view that the appeal must be allowed. I hereby order so.